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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 267

JACK H. KELLY,
Petitioner,

vs.

VINCENT W. KOSUGA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT.

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January 5, 1959

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BRIEF FOR RESPONDENT.

STATEMENT.

The essential facts are undisputed. Kosuga, the plaintiff-respondent, sold to Kelly, the defendant-petitioner, fifty carloads of onions in storage in Chicago for a price of $960 per car, or $48,000 plus storage charges. Payment of the purchase price was to be made in installments. Petitioner made partial payments and withdrew from storage thirteen cars of onions, which he merchandised. The market price for onions fell sharply,[1] and petitioner refused to accept further deliveries or to make

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[1] See petitioner's amended answer and counterclaim, R. 16; respondent's reply, R. 20; Black affidavit R. 36.

further payments of the price. After notice, respondent disposed of the remaining cars at the going market price and applied the proceeds in mitigation of damages. As part of the sale transaction, the seller (respondent) agreed that he would not deliver other onions which he owned, in satisfaction of futures contracts on the Chicago Mercantile Exchange, but would merchandise them through regular trade channels (R. 14). The defense is that on account of this non-delivery agreement, the contract was in violation of Section 1 of the Sherman Act, and therefore unenforceable.[2]

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[2] The amended answer set forth a counterclaim which the District Court dismissed (R. 43). The Court of Appeals specifically affirmed this dismissal (R. 57). Neither the petition for certiorari nor petitioner's brief refers to the counterclaim, and any claim of error with respect thereto must be taken as abandoned.

At earlier stages petitioner also suggested involvement of the Commodity Exchange Act and the Illinois antitrust laws, but the petition for certiorari abandons reliance on anything other than Section 1 of the Sherman Act.

SUMMARY OF ARGUMENT.

I. The sole question presented is abstract and hypothetical and, if the Court has jurisdiction at all, it is questionable whether the adjudication of such a question is a provident exercise of this Court's discretionary jurisdiction.

II. Assuming the illegality of the agreement not to deliver the commodity in satisfaction of futures contracts, such illegality is not in this case a defense to the seller's action for the contract price.

a. It is not true, as petitioner contends, that the decisions of this Court establish that the defense of illegality under the antitrust laws is available to guilty participants in the illegal scheme, such as petitioner proclaims himself to be, and not to innocent "strangers" to the illegal bargain.

Bruce's Juices v. *American Can Co.*, 330 U.S. 743 (1947)

D. R. Wilder Mfg. Co. v. *Corn Products Ref. Co.*, 236 U.S. 165 (1915)

Connolly v. *Union Sewer Pipe Co.*, 184 U.S. 540 (1902)

A. B. Small Co. v. *Lamborn & Co.*, 267 U.S. 248 (1925)

Continental Wall Paper Co. v. *Louis Voight & Sons Co.*, 212 U.S. 227 (1909)

b. The true principle which has informed the Court's decisions is that the defense of illegality under the anti-trust laws will be allowed only where the relief sought would aid in the consummation of the unlawful purpose; the defense will not be allowed where a judgment for the price of goods sold will not aid the unlawful purpose, but will operate only to prevent unjust enrichment and discriminatory penalties.

Bruce's Juices v. *American Can Co.*, 330 U.S. 743 (1947)

D. R. Wilder Mfg. Co. v. *Corn Products Ref. Co.*, 236 U.S. 165 (1915)

Connolly v. *Union Sewer Pipe Co.*, 184 U.S. 540 (1902)

A. B. Small Co. v. *Lamborn & Co.*, 267 U.S. 248 (1925)

Continental Wall Paper Co. v. *Louis Voight & Sons Co.*, 212 U.S. 227 (1909)

c. To allow the defense of illegality in this case would not advance the policy of the Sherman Act, but on the contrary would interfere with the policy of that act by establishing a rule which would hamper commerce and inhibit credit transactions, bearing most harshly upon the necessitous buyer who lacks the resources to do business on a cash basis; further, to allow the defense in this case would be to assist and encourage an unscrupulous buyer to speculate at the risk of the seller and to enrich himself unjustly.

Bruce's Juices v. *American Can Co.*, 330 U.S. 743 (1947)

III. Even if the assumed illegality of the non-delivery agreement constitutes a defense to the claim for the contract price, respondent is entitled to recover the reasonable value of the goods sold, which in this case is the contract price.

Bruce's Juices v. *American Can Co.*, 330 U.S. 743, 759 (1947) (dissenting opinion)

Penn-Allen Cement Co. v. *Phillips & Sutherland*, 182 N.C. 437, 109 S.E. 257 (1921)

Continental Wall Paper Co. v. *Louis Voight & Sons Co.*, 212 U.S. 227, 261 (1909)

Rosasco Creameries, Inc. v. *Cohen*, 276 N.Y. 274, 11 N.E. 2d 908 (1937)

ARGUMENT.

I.

THIS CASE PRESENTS A SINGLE QUESTION, WHICH IS ABSTRACT AND HYPOTHETICAL. ASSUMING THAT THE COURT HAS JURISDICTION AT ALL, IT IS QUESTIONABLE WHETHER THE ADJUDICATION OF SUCH A CASE IS A PROVIDENT EXERCISE OF THIS COURT'S DISCRETIONARY JURISDICTION.

We feel it incumbent upon us to draw the Court's attention to the somewhat peculiar posture of the case as it is presented by the petition for *certiorari* and the petitioner's brief. A single question is presented, which we may state thus: *Assuming* that the restriction on making deliveries in satisfaction of futures contracts violated Section 1 of the Sherman Act, does it follow that this illegality is available to the petitioner as a defense in an action for the contract price or for the reasonable value? The question of illegality is not discussed in either the petition for *certiorari* or in the petitioner's brief. It is presented to the Court only to the extent that petitioner's statement of the question is effectual for that purpose (Petition 2-3, Brief 2-3). Apparently petitioner assumes that illegality, having been alleged in the amended answer, must be taken as established for purposes of review here. While fully acknowledging the rule that, on motion to strike, the allegations of the adverse pleading must be taken to be true, we point to the equally familiar principle that this rule applies only to facts well-pleaded, and not to arguments and conclusions, especially respecting matters of law. The allegation of fact, that the agreement included a promise not to deliver the onions sold and certain others in satisfaction of futures contracts but to merchandise them in

normal trade channels, was admitted by the motions (indeed it was admitted by respondent's reply, R. 21). Beyond this, all the averments of the amended answer relating to the question of illegality, such as that the contract was "null and void under the provisions of the Sherman Anti-Trust Act" (R. 15), are conclusory and argumentative. This characterization applies to allegations as to the purpose of the condition relating to deliveries on futures contracts; it applies with special force to petitioner's allegation, reiterated in this Court, that this was a "price-fixing" agreement (R. 15, Brief for Appellant [petitioner] 3, 7, 8, 11, 23-24, 23 fn. 4, 28) that being not only a conclusion but one which is patently inconsistent with the facts pleaded. The Court of Appeals properly separated the facts well-pleaded from those of a conclusory and argumentative nature (R. 48-49).

That the non-delivery provision was a violation of the Sherman Act is *not* admitted, by the motions filed by respondent in the District Court or otherwise. The District Court held that the provision was "a reasonable restriction to assure defendant [petitioner] the enjoyment of the legitimate fruits of his contract of purchase, and to protect him from a possible derogation in the value of the property bought. This condition does not constitute an illegal restraint of trade proscribed in the . . . antitrust laws" (R. 25). The Court of Appeals, while finding it unnecessary to decide the question of illegality, indicated its agreement with the District Court.[3]

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[3] "Assuming that which we think doubtful, that is, that the non-delivery agreement was illegal, there is no more reason here than there was in **Wilder** for importing such elements of wrong into an otherwise legal and valid contract." (R. 54. See also Brief p. 23, fn. 4).

The situation, then, is this: If this Court affirms the judgment below, holding in accordance with our submission that even if illegality is assumed the petitioner is liable for the contract price, that is an end of the matter. *Cf. Bruce's Juices, Inc.*, v. *American Can Co.*, 330 U.S. 743, 747 (1947). On the other hand, if the Court should agree with the petitioner as to the effect of illegality upon the rights of the parties between themselves, the consequence would be a reversal with remand for further proceedings. In such proceedings, while the effect of illegality would be settled, the question of illegality itself would remain open. The District Court, however, has already ruled on that question and presumably would so rule again upon remand.

It is no answer to say that the Court may pass upon the question of illegality in this proceeding. The petitioner has not briefed that question. Moreover, while the factual allegations of the amended answer, assumed true for the purpose of disposing of the motions, may permit the District Court to determine that the condition was reasonable and legal, an ultimate holding of illegality may not be made on review here, since it would necessitate taking into account the allegations and denials in respondent's reply as well as all of the surrounding factual circumstances, and these, of course, do not appear on this record. In a substantial sense, therefore, petitioner is asking this court to rule upon an abstract and hypothetical question and it is submitted that such an adjudication would not be a provident exercise of this Court's discretionary jurisdiction.

II.

ASSUMING THAT THE NON-DELIVERY CONDITION WAS A VIOLATION OF THE SHERMAN ACT, THAT CIRCUMSTANCE DOES NOT CONSTITUTE A DEFENSE TO THE BUYER IN AN ACTION BY THE SELLER TO RECOVER THE CONTRACT PRICE.

Petitioner invokes the jurisdiction of this Court to obtain relief from the obligation to pay for goods bought at a price which, it is not denied, was fair and reasonable. His ground for so doing is that, while he enjoyed the benefits of the bargain, he was, according to his own protestations, an active participant in a scheme to violate the laws of the United States. Few litigants have been so candid as petitioner. He does not leave it to the Court, nor to his adversary, to characterize such a defense as dishonest and anomalous, but on his own initiative quotes this Court's statement in *McMullen* v. *Hoffman,* 174 U.S. 639, 669 (1899), repeated in *Continental Wall Paper Co. v. Louis Voight & Sons Co.,* 212 U.S. 227, 263 (1909):

> "It has been often stated in similar cases that the defense is a very dishonest one, and it lies ill in the mouth of the defendant to allege it. . . ." (Brief 20-21).

Apparently petitioner would have the Court believe that it is only because of his concern for the public welfare that he comes here, proclaiming his complicity in an illegal scheme, demanding relief from the obligation to pay for goods bought at a fair price, and invoking the discretionary jurisdiction of this Court to give him this "very dishonest" defense which the courts below have denied him. This sacrificial attitude deserves consideration by the Court in exact proportion to its nobility.

Petitioner would read the decisions of this Court as holding that, when a contract for the sale of goods is tainted with illegality, only the innocent must pay for benefits received; the rewards of unjust enrichment are reserved for the guilty. It is for this reason that we are treated to the strange spectacle of the petitioner taking considerable pains to implicate himself as an active participant in the alleged conspiracy, emphasizing his allegedly unlawful motives (Affirmative Defense, pars. 1, 4-8, R. 13-15; Brief, 10-11). Actually, on this reading of the case, petitioner perhaps did not blacken his conduct sufficiently; perhaps he would have been well advised to admit our allegation that it was the petitioner himself who imposed the non-delivery provision (R. 21). For it may not be sufficient for a party to picture himself merely as the frightened victim of conspiracy, acquiescing with reluctance (*cf.* the dissenting opinion of Mr. Justice Holmes in the *Continental Wall Paper* case, 212 U.S. at 270-271); he would enjoy the maximum chance of realizing upon his "very dishonest" defense if he makes himself out a prime conspirator.

But the decisions of this Court establish no such absurdities as these. To the extent that there are expressions in the opinions which might lend color to such an interpretation, this case affords the Court an opportunity to rectify them.

Petitioner's interpretation of the precedents is belied at the outset by the Court's most recent decision in point, *Bruce's Juices, Inc.*, v. *American Can Co.*, 330 U.S. 743 (1947). That case involved the Robinson-Patman Act rather than the Sherman Act, and we acknowledge that on that account some differences may be taken; nevertheless, the decision is fundamentally significant for the case at bar. Consistently with his general view of the cases

as authorizing unjust enrichment of the guilty while requiring the innocent to pay for goods bought, petitioner would distinguish *Bruce's Juices* on the ground that there "the defendant was a stranger rather than a party to the alleged violation and thus he could not successfully urge the violation as a defense." (Brief, 24, fn. 5). This Court, however, held just the opposite. Speaking through the late Mr. Justice Jackson, the Court said:

> ". . . [W]hen they [quantity discounts] are illegal it is as much a violation to accept or receive as to allow them. Bruce, in one of the years included in its balance of account, purchased more than a half million dollars of cans on which it received precisely the kind and amount of discount it now asserts to be illegal." (330 U.S. at 746).

Thus the Court denied the defense of illegality although the buyer was *in pari delicto*. The suggestion that the cases are to be explained on the ground that the innocent are mulcted while the guilty are rewarded is a vicious over-simplification which stultifies the law and refuses to credit this Court over the years with elementary intelligence.

The true principle which has, on the whole, consistently informed the Court's decisions in cases of this kind is thus stated in *Bruce's Juices:*

> "But when the contract sued upon is not intrinsically illegal, the Court has refused to allow property to be obtained under a contract of sale without enforcing the duty to pay for it because of violations of the Sherman Act not inhering in the particular contract in suit and has reaffirmed the 'doctrine that "where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that

which the statute prescribes.'" *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U.S. 165, 174-175; *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540." (330 U.S. at 755).

The distinction between "an agreement . . . . which has as its object and effect accomplishment of illegal ends which would be consummated by the judgment sought" (330 U.S. at 755) and a contract which is "not intrinsically illegal" may not be easy to apply in all situations (*cf.* the opinion of Judge Learned Hand in *Lyons* v. *Westinghouse Elect. Corp.*, 222 F.2d 184, 187 (2d Cir., 1955); yet enlightenment as to its purpose and effect is readily available. In *Bruce's Juices* the Court said that the judicial annexation of the sanction of loss of remedy to a statute which does not expressly provide for such a sanction is justified "only if it would be at least a rational, *nondiscriminatory* and appropriate means of making the policy of the statute effective. To allow a buyer to get his goods for nothing because the seller violated the Act . . . does not meet this test." (330 U.S. at 752 italics added). The Court went on to demonstrate in terms fully applicable to the case at bar the capricious and discriminatory way in which such a sanction operates:

> "It would seem that one test of the rationality and appropriateness of such a defense because of a violation of the Act would be that the reparation it permits should be measured at least roughly by the extent of the injury caused by the violation. This, of course, is the principle of the suit for triple damages. But that is not the principle of the defense here urged. The extent of its indemnity is not measured by injury. . . . *It is measured solely by the amount of credit the buyer obtained from the seller.* The seller would lose the amount carried in notes or in open account. Had Bruce's delinquency been greater,

so would its gain; had there been no credit asked or given the buyer could have had no remedy by way of defense." (330 U.S. at 753 italics added)

In the case at bar the petitioner alleges no damage whatever on account on the non-delivery agreement. He could not, therefore, maintain an action for treble damages, although the Sherman Act as well as the Robinson-Patman Act of course provides such a remedy. The gain which would accrue to him under the asserted defense would bear no relation whatever to indemnity but would be pure unjust enrichment. In the case at bar, by virtue of the terms on which respondent extended credit to petitioner, the penalty which would be inflicted upon respondent if the defense were allowed would be $37,243.80 (Findings of Fact, R. 42). This is a fantastic penalty by comparison with any fine which might conceivably have been inflicted in any conceivable criminal prosecution; and it would go not into the public treasury but into the pockets of a self-proclaimed participant in the "conspiracy." The penalty suffered by respondent would be greater had he been more generous in the credit terms extended to petitioner; it would be reduced to zero if cash payment had been required. It is small wonder that the Court observed that the effect of allowing such a defense would be to discourage the extension of credit, thus hampering commerce and bearing most harshly on those businessmen who lack the resources to do business on a cash basis. Certainly the policy of the Sherman Act is not advanced by such consequences.

Progressive courts have long recognized that the common law tendency to inflict forfeiture of contract rights as a penalty for fault operates in an arbitrary, capricious, and discriminatory manner. See the leading case of *Britton* v. *Turner*, 6 N.H. 481, 26 Am. Dec. 713 (1834).

The petitioner's contention would require a throwback to the kind of thinking which formerly led some courts to make civil outlaws of persons violating Sunday laws. *Cf. McGrath* v. *Merwin*, 112 Mass. 467, 17 Am. Rep. 119 (1873); *White* v. *Levarn*, 93 Vt. 218, 108 Atl. 564 (1918).

The essence of the principle stated in *Bruce's Juices* is that the Court will entertain the defense of illegality only where the contract "has as its object and effect accomplishment of illegal ends *which would be consummated by the judgment sought.*" (330 U.S. at 755). The judgment against respondent for the unpaid portion of the contract price has no tendency whatever to further or consummate the agreement respecting non-delivery on the futures market. In this respect the case before the Court is even stronger for disallowing the defense than *Bruce's Juices*, since there it was contended that the judgment had the effect of enforcing collection of an allegedly illegal component of the price—the difference between the price charged the defendant buyer and the lower prices charged to competitors. Here there is no possible basis for a suggestion that the judgment would further any illegal scheme; the sale price is concededly fair and reasonable.

The distinction between a judgment which would consummate an illegal scheme and one which would have no effect other than to require a party to pay the fair value of property which he obtained in the transaction is the very distinction which is sometimes expressed in terms of whether the illegality is "inherent" in the promise sought to be enforced or is "collateral" thereto. Such abstractions can give rise to difficulties of application, but those difficulties may be minimized if the practical purpose of the distinction is kept in mind. Assuming the illegality of the non-delivery agreement, we think it clear that no court would enforce it, as by enjoining one of the

parties from making deliveries on the futures market. On the other hand, where the judgment cannot have the effect of advancing any illegal purpose, the defense of illegality can serve no policy except the unthinkable one of permitting one person to appropriate the property of another without compensation (*cf.* 330 U.S. at 751). We might seek to buttress this point with the statement that in this case the non-delivery promises were "separable" from, or "collateral" to, the sale agreement; but it seems to us that such concepts do not help to clarify the argument, and that emphasis should be placed instead on the basic principle and its practical operation. *Cf.* 6 Corbin on Contracts Sec. 1520 (1951); Gellhorn, Contracts and Public Policy, 35 Colum. L. Rev. 679, 683 (1935).

Here again *Bruce's Juices* provides a practical guide to the situations in which the defense of illegality will be allowed and those in which it will not:

> "If, in order to prove his own case, a plaintiff proves his violation of law, then no court will aid the plaintiff to recover. Here, however, what the plaintiff must show is the notes which import consideration. If consideration is denied, he can prove that cans were sold and delivered at a stated price. That is no violation of law." (330 U.S. at 756).

So here, the respondent made his *prima facie* case by setting out the sales agreement, which is in no way dependent upon the non-delivery provision (see Exhibits attached to Complaint, R. 6-10). We do not mean, and we do not believe the Court meant, that the allowability of the defense depends upon the technicalities of pleading. The virtue of the test lies in the fact that, where the relief sought will consummate an illegal purpose, that fact is likely to be disclosed by the plaintiff's statement of his case. There may well be instances in which de-

fensive pleadings may show that the judgment, if rendered, would advance an illegal scheme, in which case the defense should be allowed. *Cf.* 6 Corbin on Contracts Sec. 1533 (1951). We do suggest that the test set out in *Bruce's Juices* is a useful, though tentative, guide to the situations in which the defense should be allowed, and that in the case at bar the whole record may be searched without yielding any indication that the judgment below can possibly advance any illegal purpose.

The case of *D. R. Wilder Mfg. Co.* v. *Corn Products Ref. Co.*, 236 U.S. 165 (1915), is likewise inconsistent with petitioner's interpretation of the cases as requiring only innocent "strangers" to the illegal agreement to pay for goods bought (Brief, 19 fn. 2, 24 fn. 5). Discussion of the case is somewhat complicated by the fact that there the defendant contended that the plaintiff, as a consequence of its being a monopolistic combination, had "no legal existence" (236 U.S. at 169), and much of the opinion of the Court was devoted to the rejection of this unusual statement of the defense. The fact remains that the case was presented to the Court as one in which the plaintiff was a combination of all the manufacturers of glucose in the United States, and in which, as part of its monopolistic plan, it had induced buyers to agree, in consideration of a system of rebates, to purchase their requirements exclusively from the plaintiff and not to resell the product. The defendant buyer had signed such a contract and thus was no "stranger" to the scheme but an active participant in it; indeed, the buyer counterclaimed for the amount of the rebate pursuant to the scheme to which he was a party (236 U.S. at 171). The Court said:

> " . . . [T]he right to enforce the sale did not involve the question of combination, since, conceding the illegal existence of the corporation making the sale,

> the obligation to pay the price was indubitable, and the duty to enforce is not disputable. This is true because the sale and the obligations which arose from it depended upon a distinct contract, with reciprocal considerations moving between the parties, —the receipt of the goods on the one hand, and the payment of the price on the other. And this is but a form of stating the elementary proposition that courts may not refuse to enforce an otherwise legal contract because of some indirect benefit to a wrongdoer which would be afforded from doing so, or some remote aid to the accomplishment of a wrong which might possibly result,—doctrines of such universal acceptance that no citation of authority is needed to demonstrate their existence, especially in view of the express ruling in *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540, applying them to the identical general question here involved." (236 U.S. at 172).

The decision thus most certainly did not go on the ground that the buyer was an innocent stranger to the monopolistic scheme, but rather on the ground that the mere circumstance that the seller may benefit, even to the extent of realizing a profit on the sale, is not sufficient cause for departing from the usual rule that contracts will be enforced. Something more by way of advancement of the illegal scheme is required before the defense of illegality will be heard.

In *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540 (1902), and *A. B. Small Co.* v. *Lamborn & Co.*, 267 U.S. 248 (1925), the extent of the buyer's participation, if any, in the illegal arrangement does not appear. There is not a word in either decision, however, to support the notion that the buyer was required to pay for the goods sold because he was an innocent bystander rather than a guilty participant. The basis for the holding in both cases was simply that the appropriate sanctions for violation of the Sherman Act are those set out in the Act

itself, and that the just obligations of a contract will be enforced where the relief sought will not directly advance the illegal purpose.

Of all the relevant decisions of this Court, only one suggests even an apparent or temporary deviation from the principle here suggested. *Continental Wall Paper Co.* v. *Louis Voight & Sons. Co.*, 212 U.S. 227 (1909). Petitioner necessarily places sole reliance on this decision. We submit that even this reliance is misplaced. The consistency of the *Continental* decision with the other decisions of this Court can be shown, and has in fact been demonstrated by the Court itself in subsequent cases. That *Continental* is consistent with *Connolly*, the Court's pioneer decision in this area, is indicated at the outset by the fact that the opinion of the Court in each case was written by Mr. Justice Harlan. In *Continental* the Court was divided five to four on the issue presented, Mr. Justice Holmes and Mr. Justice Brewer writing dissenting opinions. We submit that, as in the other decisions of this Court, there is no basis whatever in this decision for the suggestion that the availability of the defense of illegality turns upon the success of the buyer's unbecoming effort to incriminate himself.

It is true that in *Continental* the buyer, a participant in the conspiracy, was allowed to assert the defense of illegality in an action for the price of goods sold and delivered. But the fact that the buyer was a guilty participant in the scheme was not the reason for allowing the defense. Mr. Justice Harlan said specifically, "it is of no consequence that the present defendant company had knowledge of the alleged illegal combination and its plans, or was directly or indirectly a party thereto." (212 U.S. at 262). The reason for allowing the defense was that the majority of the Court believed that to do other-

wise would be "to give the aid of the court in making effective the illegal agreements that constituted the forbidden combination." (212 U.S. at 261). In other words, the relief sought would not merely result in the buyer's paying a just price for the goods, to the possible profit of the seller, but would otherwise, and directly, further the aims of the combination. "It is admitted by the demurrer to that defense that the account sued on has been made up *in execution of the agreements* that constituted or out of which came the illegal combination formed for the purpose and with effect of both restraining and monopolizing trade and commerce among the several states." (212 U.S. at 261—italics in the original). Again, the Court said that the judgment sought would "give effect, as far as it goes, to agreements that constituted that combination, and *by means of which the combination proposes to accomplish forbidden ends.*" (212 U.S. at 262—italics added). Mr. Justice Harlan distinguished his own holding in the *Connolly* case at length. Much emphasis was given to the fact that in *Connolly* the defense asserted went to the illegal character of the combination as such, and to the fact that the contract of sale was "collateral" to the existence of the illegal combination. A discriminating interpretation of the distinction reveals, however, that what was important was that in *Connolly* the relief sought would not advance the objectives of the conspiracy, while in *Continental* it would.

A brief review of the facts in *Continental* will make the point clear. Manufacturers of 98 per cent of the wallpaper produced in this country determined to control prices and production through a joint committee which was to "adopt rules and regulations governing the manner of conducting the business" of the participants. This committee was established as the board of directors of a dummy corporation, Continental, which had no function

except as the instrument through which the conspiracy was effected. Yet one of the functions assigned to it was that of exclusive selling agent of the manufacturers, the corporation taking title to all their output for that purpose. Jobbers and other wholesalers were required to sign contracts to buy their entire requirements from the corporation, and to agree to restraints upon their freedom in determining prices upon resale. Moreover, the defendant alleged that, by virtue of the conspiracy, the prices in the account on which suit was based were unreasonable and excessive:

> "'The allegations in said plaintiff's petition set forth as a suit on account are an attempt to enforce, carry out, and recover upon and by virtue of said unlawful combination, aforesaid, *the prices fixed by such combination, and the prices therein sought to be recovered for said merchandise are unreasonable, excessive, and above the fair market price of such merchandise by more than the amount so sought to be recovered.*'" (212 U.S. at 253. The italics are in Mr. Justice Harlan's statement of the case).

Plainly the Court felt that to grant the relief sought would further the aims of the conspiracy in two ways: (1) a judgment in favor of the dummy corporation, which was not the real party in interest, was not the seller of the goods and which had no function other than that of directing and policing the conspiracy, would directly aid the unlawful scheme; and (2) the object of the conspiracy being to increase prices artificially, and that object having been accomplished to the extent that the prices in the contracts in suit were themselves artificial and excessive, being the very prices the conspirators had agreed to charge, the enforcement of the obligation to pay those prices would make the Court a party to the consummation of the illegal purpose.

It is apparent that, thus interpreted, the *Continental* case is no authority against the enforcement of the contract in the case at bar. If the non-delivery agreement here was designed to stabilize prices on the futures market, that purpose had nothing to do with the price charged in this sale of actual onions. The price charged upon the sale of the actual commodity was the going market price, unaffected by any agreement of the parties, and was fair and reasonable. Enforcement of the duty to pay that price could have no tendency whatever to further the alleged purpose of stabilizing market prices.

This interpretation of *Continental* is forcefully supported by the fact that, in later Sherman Act cases such as *Wilder* (236 U.S. 165) and *Small* (267 U.S. 248), where it did not appear that the judgment would advance the purposes of the conspiracy directly by enforcing excessive prices or otherwise, the defense of illegality was not allowed.[4] Indeed, in *Wilder* the Court pointed to the following distinguishing factors in the *Continental* case:

> "(a) the relations of the contracting parties to the goods sold, (b) the want of real ownership in the seller, (c) the peculiar obligations which were imposed upon the buyer, and (d) the fact that to allow the nominal seller to enforce the payment of the price would have been, in and of itself, directly to sanction and give effect to a violation of the anti-trust act inhering in the sale." (236 U.S. at 177).

It is clear, that in points (a), (b) and (d) the Court was saying, as we have said, that to allow the dummy corporation to recover the price, when that corporation had no

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[4] In none of the lower court decisions cited by petitioner in his brief page 22 fn. 3, was the claim of alleged antitrust illegality permitted as a defense to an action for goods sold and delivered.

reason for existence except as the indispensable instrument of the conspiracy, would have been to aid and abet the illegal scheme, while the refusal to recognize that agency of the conspirators might well be a death blow to the on-going conspiracy.

Mr. Justice Harlan's efforts to distinguish his prior holding in *Connolly* were not convincing to the dissenting members of the court which decided *Continental*. Mr. Justice Holmes said:

> "Whenever a party knows that he is buying from an illegal trust, and still more, when he buys at a price that he thinks unreasonable, but is compelled to pay in order to get the goods he needs, he knows that he is doing an act in furtherance of the unlawful purpose of the trust, which always is to get the most it can for its wares. But that knowledge makes no difference, because the policy of not furthering the purposes of the trust is less important than the policy of preventing people from getting other people's property for nothing when they purport to be buying it. . . . In this case, however, the defendant was an unwilling accessory, exactly as Dee was in the *Connolly Case*." (212 U.S. at 270-71).

Mr. Justice Brewer, agreeing with Mr. Justice Holmes, also dissented separately on the ground that, as the Court had said before and has repeated since, the penalties imposed by the Sherman Act are exclusive and leave no room for the imposition by the courts of additional civil sanctions.

We leave it to this Court to determine whether the *Continental* case is distinguishable on the grounds suggested or is a temporary aberration from the sound principle which the Court has applied in all its other decisions. In either event, there is no possible basis in that decision for the petitioner's claim that the defense of

illegality should be reserved for guilty participants. In either event the judgment enforcing the contract in the case at bar should be affirmed.

By way of final comment on *Continental,* we note the passage in which the Court said: "To refuse to grant either party to an illegal contract judicial aid for the enforcement of his alleged rights under it tends strongly towards reducing the number of such transactions to a minimum." (212 U.S. at 263). This statement, we suggest, was made at a time when the Court was relatively confident of its ability to foretell the effects of rules of law on human behavior. We regret that we can cite the Court to no empirical study of the effects of the supposed rule of the *Continental* case on the number of illegal bargains which are contracted. We respectfully doubt, however, that such a study could show that the denial of a remedy against the buyer, as distinct from the sanctions provided by the Sherman Act itself, has a material deterrent effect. The existence of the rule (if it does exist as assumed) did not prevent the formation of the contract here in suit, for instance—for the very good reason that the seller, at least, obviously had no idea that the parties were committing an illegal act (if they were), or, at the least, the seller was not aware of this assumed legal consequence of the assumed illegality. Given knowledge of the assumed illegality and its assumed consequences, no seller in his right mind would have extended credit, as respondent did. In a time when multitudinous regulations make unlawful acts which are only *mala prohibita,* illegality is not a factor which is likely to be apparent to a group of onion growers and traders at a conference to consider a critical market condition; it is much more likely to be a factor introduced after the event, and after prolonged study by lawyers.

for a purpose which petitioner himself characterizes as dishonest. Moreover, if it is assumed that the risk of illegality is somehow present to the minds of the parties —or one of them—the only statement that can be safely made is that one of them may be deterred from entering into the agreement by the fact that illegality is available as a defense. The *seller* might be deterred; but the rule (if there is such a rule) authorizing the defense is a positive inducement to the buyer to make a contract such as was made in this case, since he is thereby enabled to speculate at the risk of the seller. Having bought the onions at their fair market value, he is safe if the price remains stable, and he profits if the price goes up. If, as happened in the present case, the market price declines, he need not suffer the loss, but may simply wash his hands of the matter and thereby shift the loss to the seller.

In this connection we cannot avoid reference to the petitioner's startling contention (Brief, 25-26, fn. 6) that he realized no windfall—no unjust enrichment—for the reason that the portion of the price which he paid was sufficient to cover the thirteen cars which he elected to withdraw from storage under the contract. In the first place, his arithmetic is wrong. Thirteen cars at $960 per car amount to $12,480—only twenty dollars less than the partial payment which was made—and this computation takes no account of the fact that respondent incurred for petitioner's account storage expenses totalling $5,082. Even on petitioner's strange theory of accounting, all but $20 of the storage charges attributable to the thirteen cars withdrawn is out-of-pocket expense to respondent and unjust enrichment to the petitioner. But this does not go to the heart of the matter, which is that the entire argument in the footnote is a stark and reprehensible at-

tempt to confuse the issue. On the making of the contract petitioner acquired title to specific and designated lots of onions in specific storage locations (R. 7). See *Smith-Hurd Illinois Rev. Stat.* c. 121½, Secs. 18, 19; *Collins* v. *Oliver,* 299 Pa. 372, 149 Atl. 647, 649 (1930). This was on December 17, 1955. As late as February 20 of the following year petitioner acknowledged the agreement (R. 10). During all this time the onions were his own, and he treated them as his own. He had the complete power to dispose of them as he pleased. If he chose to speculate, allowing the onions to rot in storage while he waited for higher market prices which did not come, this Court will certainly not be deceived when he assumes a mask of piety and has the effrontery to pretend that he has paid for what he got.

Assuming that the prospective seller of goods is aware of the possible illegality of one of the terms of sale, it may well be that he would be deterred from entering into the transaction by the strong penalties imposed by the Sherman Act itself. If those penalties do not deter him, it is difficult to understand how he would be deterred by the prospect of judicial imposition of the cumulative civil penalty of loss of remedy for the price, even if he is aware that such would be a consequence of the illegality. This is especially true since, as this Court pointed out in *Bruce's Juices,* the seller has only to refuse credit in order to escape entirely the force of this additional judicial sanction. Of itself, such a sanction has no logical tendency to inhibit illegal transactions, but only to inhibit credit transactions.

The only reason that has ever been advanced for denying the seller his remedy for the price is that the policy of inhibiting illegal transactions is thereby advanced. Even if denial of the remedy did produce this result, the

consequences of the rule would be too great a price to pay for the gain: for the consequences are to enable unscrupulous buyers to enrich themselves unjustly, to obtain the property of others without payment, to capitalize on their own infamy, to speculate at the risk of another and to exact "legal blackmail" (note, 47 Colum. L. Rev. 867, 869 (1947))—all with the aid and encouragement of the courts and the law. When it is recognized, as this Court has recognized, that the rule in fact does not tend to produce the imagined result of inhibiting illegal transactions, but only to inhibit credit transactions, bearing most heavily upon the necessitous buyer, it should be overwhelmingly obvious that there is no justification whatever for employing a rule which produces such odious results. Certainly the allowance of the defense in such circumstances cannot advance the policy of the Sherman Act.[5]

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[5] The legislative history of the federal antitrust acts demonstrates that Congress repeatedly rejected provisions of bills which would have authorized violations of the antitrust laws to be asserted as a defense in a civil action. Seven of the bills introduced in the same month as the Sherman Act contained provisions to that effect: Bills and Debates in Congress relating to Trusts (1903), Senate Document 147, 57th Cong., 2nd Session. None of these provisions was adopted or even brought to a vote. When the Clayton Act was adopted, Congress rejected a proposal by Senator La-Follette which would have authorized such a defense: S 191, S 2552, 63rd Cong., 1st Session. By contrast, in several instances state antitrust legislation enacted in the same period provided that the purchaser from a violator could prove the violation as a complete defense to an action for the contract price. See Lockhart, Violation of the Antitrust Laws as a Defense in Civil Actions, 31 Minn. L. Rev. 507, 508-09 (1947).

III.

ASSUMING THAT THE NON-DELIVERY PROVISION WAS UNLAWFUL, AND FURTHER ASSUMING THAT IN CONSEQUENCE THE DEFENSE OF ILLEGALITY IS AVAILABLE TO THE BUYER IN AN ACTION ON THE CONTRACT TO RECOVER THE AGREED PRICE, THE SELLER IS NEVERTHELESS ENTITLED TO RECOVER THE REASONABLE VALUE OF THE GOODS SOLD, AND IT IS NOT DENIED THAT THE CONTRACT PRICE IS ITSELF THE REASONABLE VALUE.

The four dissenting justices in *Bruce's Juices*, while contending that the defense of illegality should be available to the defendant with respect to recovery of the contract price, including its illegal component, nevertheless positively affirmed the right of the seller to recover on a *quantum meruit* basis:

> "If the petitioner [buyer] were to prevail in this case and the promissory notes were to be declared unenforceable, respondent [seller] would still be free to recover on a *quantum meruit* basis if it has not already so recovered. See *Penn-Allen Cement Co.* v. *Phillips*, 182 N.C. 437, 109 S.E. 257." (330 U.S. at 759).

The Court in the *Continental Wall Paper* case implied the same position:

> "The present suit is not based upon an implied contract of the defendant company to pay a reasonable price for goods that it purchased . . ." (212 U.S. at 261).

All nine members of the Court in *Bruce's Juices* were agreed on the proposition that in any event the seller was entitled to recover, and the buyer was required to pay, the reasonable value of the goods sold and delivered, notwithstanding the taint of illegality and notwithstanding

a possible defense to the demand for the contract price as such.[6]

In the case at bar the price of $960 per car was the going market price for onions. There has never been the slightest suggestion that that price was anything other than the fair and reasonable value of the commodity at the time of sale. The storage charges are the actual out-of-pocket expenses incurred by the seller for the buyer's account, and no suggestion has been or can be made that they were other than fair and reasonable. Of course, under the Federal Rules of Civil Procedure the respondent was not required to plead the "common counts," but is entitled to recover the reasonable value on the complaint as it stands. (Rule 8(a).) It follows that a reversal of the judgment for the contract price would be a pointless formality, since that judgment should in that event immediately be replaced by another, in the identical amount, representing the reasonable value of the goods sold plus storage charges.

The principle that the seller is entitled at least to the reasonable value of the goods notwithstanding the taint of illegality is in line with the most enlightened views of other courts see *Rosasco Creameries, Inc.*, v. *Cohen*, 276 N.Y. 274, 11 N.E. 2d 908 (1937) and of legal scholars. Professor Page said of the early common law rule, denying recovery even on a *quantum meruit* basis:

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[6] It is true that the majority of the Court, assumed that, if illegality were a defense to the claim for the contract price, recovery on the basis of quantum meruit would not be available. 330 U.S. at 748, note 1. Nevertheless, the fact remains that all members of the Court concurred in the view that the plaintiff should recover either the contract price or the reasonable value. Cf. Lockhart, Violation of the Anti-Trust Laws as a Defense in Civil Actions, 31 Minn. L. Rev. 507, 543 (1947).

> "In contracts of this sort the more adroit of the two parties who is likely to be the habitual law breaker, secures performance by the adversary party in advance; and the effect of applying this rule is therefore to secure immunity to the habitual law breaker." (2 Page, The Law of Contracts, Sec. 1061 (1920).)

And Professor Wigmore said:

> "But the whole notion is radically wrong in principle and produces extreme injustice. If A owes B $5,000, why should he not pay it whether B has violated a statute or not? . . . [T]he doctrine now under consideration requires, with monstrous injustice and blind haphazard, that the plaintiff shall be mulcted in the amount of his right, whatever that may be." (Wigmore, A Summary of Quasi-Contracts, 25 Amer. L. Rev. 712, note (k) (1891).)

See also 6 Corbin on Contracts Sec. 1534, p. 1057 (1951); Gellhorn, Contracts and Public Policy, 35 Column. L. Rev. 679 (1935); Wade, Restitution of Benefits Acquired Through Illegal Transactions, 95 U.Pa. L. Rev. 261 (1947).

CONCLUSION.

For the reasons heretofore stated, we respectfully submit that (a) the writ of certiorari should be dismissed or (b) that the judgment should be affirmed on the ground that the alleged illegality is not a defense to an action for the contract price or (c) that the judgment should be affirmed on the ground that the alleged illegality is not a defense to an action for the reasonable value of the goods sold, which, in this case, is the same as the contract price.

Respectfully submitted,

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